**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 29**

**NEW YORK PAVING INC.**

**Respondent**

**and** **Case No. 29-CA-254799**

**CONSTRUCTION COUNCIL**
**LOCAL 175, UTILITY WORKERS**
**UNION OF AMERICA, AFL-CIO**

**Charging Party Union**

**Counsel for the Acting General Counsel's Response to Respondent New York Paving's Motion to Strike Portions of Counsel for the Acting General Counsel's Post-Hearing Brief**

On March 9, 2021, New York Paving, Inc. ("Respondent") filed a Motion to Strike Portions of Counsel for the Acting General Counsel's ("CGC") Post-Hearing Brief to the Administrative Law Judge. As discussed below, Respondent's Motion is a thinly-veiled attempt to submit a reply brief – which it is not permitted to file under the Board's Rules and Regulations. Not only is Respondent's Motion an impermissible attempt to circumvent the Board's Rules and Regulations, Respondent's Motion is also replete with false accusations. Respondent's bad faith attempt to delay this proceeding with an improper responsive briefing, in violation of the Board's Rules Regulations, should be rejected. *See* 29 CFR § 102.42; *see also Triple A Fire Protection, Inc.*, 1993 WL 1609330, NLRB Div. of Judges (Mar. 26, 1993) ("there is no right to file reply briefs before ALJs").

In its Motion, Respondent levels certain accusations that are factually incorrect and simply false. For example, in its first objection, Respondent claims that "there is nothing contained

in the Answer, the hearing transcript, or exhibits supporting" CGC's statement that "Respondent also asserts that the management rights language in the very same collective bargaining agreement permitted Respondent to shut down its asphalt paving operations and conduct the layoffs at issue here without bargaining with Local 175." Respondent's assertion is patently false. Respondent's Twelfth Affirmative Defense in its Answer plainly states, "Pursuant to the "contract coverage" principle, Respondent did not have to engage in any bargaining with the Charging Party Union due to the terms and conditions contained in any applicable collective bargaining agreement." GC Exh. 1(I) at page 5. Respondent also explicitly raised this "contract coverage" defense in its Position Statement to the Regional Director, which is in evidence as General Counsel Exhibit 22. In that Position Statement, Respondent argued,

> "Furthermore and in accordance with the Agreement, NY Paving is the "sole judge as to work to be performed." Because the Agreement does not contain a clause limiting NY Paving's right to layoff employees, NY Paving had the unilateral, unreviewable right to determine the work that needed to be performed by the asphalt employees, and layoff Local 175 [sic] depending on the amount of work available. " GC Exh. 22 at page 12.

Respondent cited to its collective bargaining agreement, which it attached to the Position Statement. GC Exh. 22 at page 12 n. 39.[1] Therefore, Respondent's claim that it did not raise a defense based on the management rights language in its collective bargaining agreement is baseless and CGC's argument contained in its Brief to the ALJ is wholly proper.

Similarly, Respondent claims that CGC's statement in its brief that "Respondent assumed Local 1010 would file a new petition during the contract's open period" is "not grounded on record evidence." Again, Respondent's accusation is patently false. In that regard, the credible testimony of Local 175 attorney Matthew Rocco, on page 110 of the transcript – which CGC cited in his brief

[1] Respondent also includes a "contract coverage" argument in its post-hearing brief. Resp. Post-Hearing brief p. 78, n. 30.

- establishes that indeed, Respondent anticipated that Local 1010 would file a representation petition during the open period:

> **Rocco:** On the Union's end, the Union was very concerned about the presence of Local 1010. And the Union was -- wanted to have a contract so that there could be certainty with respect to what the Union thought could be an upcoming open period in 2022.
> **CGC:** And --
> **Rocco:** Excuse me. 2020.
> **CGC:** And what did Mr. Farrell say about that?
> **Rocco:** He acknowledged that there very well could be an open period and that Local 1010 very well could file a petition.

Rocco's credible testimony recounting his conversation with Mr. Farrell plainly supports CGC's contention that "Respondent assumed Local 1010 would file a new petition during the contract's open period." It cannot be more clear that Respondent's accusation that the CGC's argument was not grounded in the record evidence is false.

Respondent argues in its brief that Rocco is not a credible witness. However, raising a credibility issue fails to support Respondent's claim that portions of CGC's brief should be stricken. Quite to the contrary, the presence of a credibility issue proves that CGC's statement **is** grounded on record evidence; otherwise, there would be no credibility issue for the ALJ to resolve. Respondent's credibility argument should be rejected as another unsupported accusation and an improper attempt to sneak new arguments in this disguised reply brief – that it is not permitted to file - under the guise of its Motion.

Many of Respondent's other objections are nothing more than unfounded, unsupported assertions that the Administrative Law Judge should not adopt CGC's argument and characterizations of the evidence. For example, Respondent objects to CGC's statement that Respondent counsel Getiashvili testified that, "it is her practice to disobey subpoenas." Indeed, Getiashvili did not say those exact words on the record. However, CGC's statement is an accurate

characterization of her testimony, as Getiashvili testified that she does not create a privilege log, even when the Subpoena demands it, "unless it becomes an issue somehow" - an admission that Getiashvili has a practice of disobeying the requirement of creating privilege logs when served with subpoenas unless it becomes an issue. Respondent may not like that its attorney admitted to her practice of regularly not creating privilege logs. However, CGC characterizing Getiashvili's admission that she does not create a privilege log, even when required by a subpoena (and in this case, when required by an administrative law judge's order) as a practice of disobeying subpoenas is an accurate representation of Getiashvili's testimony. Here, Respondent is falsely accusing CGC of engaging in misconduct to shield its attorney from an accurate characterization of her own testimony concerning her failure to comply with subpoenas. This baseless argument has no place in a Motion to Strike and is certainly no basis to strike any portion of CGC's brief.

The remaining allegations in Respondent's Motion to Strike are similarly flimsy assertions that rest on credibility resolutions or CGC's accurate characterization of record evidence. As such, Respondent's allegations reveal that Respondent does not really hope to strike anything from CGC's brief. Rather, as demonstrated above, the Motion is an improper attempt to file a reply brief to add substantive argument where the Board prohibits it and is designed to further delay the Administrative Law Judge's decision. Accordingly, Respondent's Motion should be rejected in its entirety.

Dated March 12, 2021 at Brooklyn, New York:

/s/
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